

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KELLY A. AYOTTE, :

4 ATTORNEY GENERAL OF :

5 NEW HAMPSHIRE, :

6 Petitioner :

7 v. : No. 04-1144

8 PLANNED PARENTHOOD OF :

9 NORTHERN NEW ENGLAND, :

10 ET AL. :

11 -----X

12 Washington, D.C.

13 Wednesday, November 30, 2005

14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United

16 States at 11:02 a.m.

17 APPEARANCES:

18 MS. KELLY A. AYOTTE, ESQ., Attorney General,

19 Concord, N.H.; on behalf of the Petitioner.

20 MR. PAUL D. CLEMENT, ESQ, Solicitor General,

21 Department of Justice, Washington, D.C.; as

22 amicus curiae, supporting Petitioner.

23 MS. JENNIFER DALVEN, ESQ., New York, N.Y.; on behalf

24 of the Respondents.

25

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3	On behalf of the Petitioner.	
4	MR. PAUL D. CLEMENT, ESQ.	19
5	As amicus curiae, supporting	
6	Petitioner.	
7	MS. JENNIFER DALVEN, ESQ.	29
8	On behalf of the Respondents.	
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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear
argument next in Ayotte versus Planned Parenthood of
Northern New England. General Ayotte.

ORAL ARGUMENT OF KELLY A. AYOTTE
ON BEHALF OF THE PETITIONER

MS. AYOTTE: Mr. Chief Justice and may
it please the Court:

The court of appeals struck down New
Hampshire's parental notification act on its face
based on a potential application of the act that even
respondents say may only arise in the smallest
fraction of cases. In doing so, the act was rendered
ineffective in the overwhelming number of
applications where it is unquestionably
constitutional, and state officials were denied the
opportunity to apply and enforce New Hampshire's act
within constitutional limits.

New Hampshire's act can be applied in a
manner to protect a minor's health if the rare case
arises where a medical emergency occurs that requires
an immediate abortion. In that rare case, if it does
arise where an abortion has to be performed
immediately and the child does not want to notify a

1 parent, there is a judicial bypass mechanism
2 available which requires New Hampshire courts to act
3 promptly and without delay and in the best interests
4 of the minor.

5 JUSTICE SOUTER: May I interrupt you at
6 this point? Because there is one thing that I'm not
7 sure that I understand about your position, and one
8 way of reading your brief takes you a step beyond
9 what you have just said. So I would like to get
10 clear on this.

11 And I understood your argument to be that
12 given the safeguards such as judicial override, there
13 simply was no -- there was no need to read the health
14 exception in, that in fact it was taken care of --
15 any of the issues that might be raised in arguing for
16 the need for health exception in fact were addressed
17 by the statute.

18 The point at which I'm not clear on your
19 position is -- occurs in what you've said on page 11
20 of your yellow brief, if you could get that out. Do
21 you have the carry over paragraph on 11? You go
22 through the kind of worst case analysis. And you
23 say, well, you know, assuming that all of the
24 safeguards somehow do not work, finally, in the
25 unlikely event that a parent refuses to waive the

1 48-hour waiting period and so on, a doctor who
2 performs an emergency abortion under such
3 circumstances would not be subject to either criminal
4 prosecution or civil liability because his or her
5 conduct would not only be constitutionally protected
6 but would be independently justifiable, and then you
7 cite the competing harms. What do you mean when you
8 say it would be constitutionally protected?

9 I read that as suggesting that there was
10 indeed a constitutional requirement for some kind of
11 a health exception, but that may not be what you
12 meant. What do you mean by constitutionally
13 protected? Where are you getting that?

14 MS. AYOTTE: Justice Souter, in that
15 instance, we did not say that it was an independent
16 constitutional requirement that there be a health
17 exception, but certainly reading this Court's cases,
18 we should apply our act in a manner to protect if
19 that rare case arises where an emergency abortion
20 would come forward. And, if a physician were
21 prosecuted under those circumstances, we believe not
22 only would he have a statutory ability to say this
23 prosecution is inappropriate given our law, but also
24 given those rare circumstances, we do not think that
25 he, under the Constitution, may be prosecuted.

1 JUSTICE SOUTER: And if he said, I may not
2 be prosecuted under the Constitution because, what
3 follows because, in your view?

4 MS. AYOTTE: I may not because New
5 Hampshire's act may not be applied in a manner to
6 ensure that if a minor in that rare circumstance
7 needs an immediate abortion, that she receives that
8 immediate medical care in those circumstances.

9 JUSTICE SOUTER: Doesn't that mean because
10 there is a required health exception? I mean, isn't
11 that what you're saying?

12 MS. AYOTTE: Justice Souter, not that
13 there is an express requirement of a health exception
14 but that the law cannot be applied in a manner to
15 infringe on the minor's health if that rare emergency
16 case arises.

17 JUSTICE KENNEDY: Your first answer to
18 Justice Souter was that the physician would say you
19 can't be prosecuted under our law. Do you mean this
20 act that we're looking at here? Or do you mean the
21 law generally including constitutional protections
22 that this Court has proclaimed?

23 MS. AYOTTE: Justice Kennedy, in that
24 limited circumstance, we do not believe that the
25 physician would be prosecuted under our parental

1 notification act, given that there is a mechanism --

2 JUSTICE KENNEDY: Because of the text of
3 the act or because of some policy that the attorney
4 general would follow in order just to decline to
5 prosecute? I want to know what this act says in the
6 instance posed by Justice Souter.

7 MS. AYOTTE: Justice Kennedy, with
8 respect to the act itself, assuming it were a life --
9 excuse me, a health emergency short of a
10 life-threatening emergency, where a minor did not
11 want to notify her parents and assuming those
12 situations came forward and someone was unable to
13 reach a judge, the act itself provides a mechanism in
14 it that anticipates providing a judge where
15 necessary, and so that would be the ability of a
16 minor in those circumstances to seek a judge.

17 But if for some reason all of those
18 situations came together and the minor could not seek
19 a judicial bypass in those instances, there is an
20 existing provision of New Hampshire law, our
21 competing harms defense, that we believe protects the
22 physician in those circumstances.

23 JUSTICE BREYER: Let's just imagine a real
24 circumstance. A 15 year-old walks in 2:00 in the
25 morning on Saturday into the emergency room and the

1 doctor looks at her, she's pregnant, she has this
2 very high blood pressure, whatever. And the doctor
3 thinks to himself, he thinks, well, immediate
4 abortion, no question, immediately deliver the child.
5 If I don't, I don't think she's going to die but
6 she'll never have children.

7 And he's thinking that. What's supposed
8 to happen? He calls up Pam Pevagoglio or Pam
9 Livingston and there is no answer. It's 2:00 in the
10 morning and there is one of those things, leave a
11 message, okay? Should I call your parents? No.
12 They don't know I'm pregnant. Now, what's supposed
13 to happen?

14 MS. AYOTTE: Justice Breyer, the
15 physicians in those instances could perform an
16 immediate abortion.

17 JUSTICE BREYER: It doesn't say that in
18 the statute. It suggests the contrary. So what is
19 the particular provision of New Hampshire law that
20 tells that -- I mean, the doctor -- all these things
21 are, you know, questions of probability. And he
22 doesn't want to risk being prosecuted and he doesn't
23 want to risk losing his license. And so what
24 particular provision -- he happens to have his lawyer
25 with him.

1 (Laughter.)

2 JUSTICE BREYER: What does the lawyer say?
3 What's the provision that saves him? There is no
4 health exemption in the statute.

5 MS. AYOTTE: Your Honor, his lawyer
6 would advise him, in those circumstances, that the
7 competing harms defense would protect his actions
8 because he needs to act urgently necessary --

9 JUSTICE O'CONNOR: Would it protect him
10 from a civil damages action as well as prosecution?

11 MS. AYOTTE: Justice O'Connor, by the
12 plain language of the competing harms defense, it
13 also includes civil liability. I would also say that
14 that lawyer would also advise him, if given the
15 opportunity, the attorney general is prepared also to
16 issue an opinion describing the applicability of the
17 competing harms defense. And with very rare
18 circumstances --

19 JUSTICE BREYER: How do we know? I mean,
20 what you're saying is fine, but how do we know that
21 that's actually the law? I mean, there are a lot of
22 people who absolutely in very good faith would say
23 that it isn't competing harms. They would say that
24 the competing rights of the life of the fetus is more
25 important than the possibility of the mother having

1 children in the future herself.

2 See, there are people in good faith on
3 both sides of this argument. And so how do we know
4 that the New Hampshire statute is going to do -- not
5 the statute, but your competing harms defense is
6 going to do for this particular woman what a health
7 exception would do?

8 MS. AYOTTE: Justice Breyer, because
9 the harm that is being raised here is the harm of
10 urgently providing care to this minor who needs it,
11 as opposed to the harm that the act is trying to get
12 at, which is notification of parents. It's not
13 whether or not the minor can have an abortion. The
14 minor can always go forward and have an abortion
15 under these circumstances.

16 So people aren't weighing the right of the
17 fetus innocence and the right of the mother's health.
18 So the weighing is quite easy. And if given the
19 opportunity, my office would be prepared to issue an
20 opinion.

21 JUSTICE GINSBURG: An opinion. That's a
22 real problem here for the doctor who is on the line.
23 And you said the lawyer would say, oh, you've got
24 this defense of -- what do you call it --

25 JUSTICE STEVENS: Competing harm.

1 JUSTICE GINSBURG: Competing harm defense.
2 I think that a lawyer who cares about his client
3 would say, defense is not what we want. What we want
4 is no claim, not that you have to put up a defense
5 and maybe the attorney general would give us a
6 decision that would come under that defense.
7 Wouldn't a careful lawyer say, what you need to be
8 protected is that there is no claim of doing what
9 you're doing?

10 MS. AYOTTE: Justice Ginsburg, in the
11 Thermopolis decision delivered by this Court, one of
12 the issues that was raised was a medical -- the
13 physician was prosecuted for performing an abortion
14 outside the parameters of the Virginia act. And the
15 physician raised a medical necessity defense. This
16 Court held that that was sufficient prosecution, that
17 that was okay. And this would work the same way.
18 Once the physician raises the competing harm --

19 JUSTICE STEVENS: Suppose the lawyer or
20 the doctor are aware of the legislative history and
21 say, well, generally that's true. But when you have
22 a legislative history that suggests that the
23 legislature considered this very defense and rejected
24 it in the statute, wouldn't that then give them some
25 concern?

1 MS. AYOTTE: Justice Stevens, the
2 legislative history -- there certainly was some
3 indication that the legislature did not want a
4 general health exception. There is no indication in
5 the legislative history that the legislature intended
6 to preclude this narrow category of cases which
7 constitute emergency --

8 JUSTICE STEVENS: But if they discussed
9 the issue on the floor of the legislature, why
10 wouldn't they have drafted the precise protection
11 they thought appropriate?

12 MS. AYOTTE: Your Honor, when they
13 discussed the history on the floor of the House and
14 Senate, they felt that it protected for emergencies
15 and there was no discussion of this narrow category
16 of cases short of death.

17 JUSTICE SCALIA: And you have another
18 point about how general this statute is. We don't
19 normally interpret statutes this way, that they are
20 totally invalid if any application of them would be
21 unconstitutional. That's not what we do with
22 statutes normally, is it?

23 MS. AYOTTE: Justice Scalia, no. In
24 fact, the analysis, if you look at this one potential
25 application, this -- the standard applied by the

1 court of appeals in this case goes well beyond even a
2 substantial overbreadth test that is applied by this
3 Court in the --

4 CHIEF JUSTICE ROBERTS: Am I right in
5 reading your briefs that you don't object to a
6 preenforcement challenge to the bypass procedure
7 itself brought by physicians, for example?

8 MS. AYOTTE: Mr. Chief Justice, no, we
9 do not object in that sense. We think that is a very
10 good mechanism to bring forth a case given that this
11 Court has granted third-party standing to physicians
12 to resolve these types of claims.

13 CHIEF JUSTICE ROBERTS: And I gather that
14 the debate on the evidence and the circumstances that
15 might arise in that case would be quite similar to
16 the debate in the present context. In other words,
17 there would be the same discussion between the
18 different physicians about what emergencies arise and
19 in what circumstances and whether that creates a
20 problem and whether you can get to the courts in time
21 and so on. It would be the same underlying sort of
22 evidence that we have here, right?

23 MS. AYOTTE: Mr. Chief Justice, it
24 would, but it would be much more narrowly focused in
25 terms of bringing it as an as-applied challenge, this

1 would --

2 JUSTICE GINSBURG: How would it be
3 as-applied? Look at your reply brief at page 3. You
4 made it very clear in light of the -- that you did,
5 that there could be this preenforcement action by
6 doctors who would not have to wait until faced with
7 an actual medical emergency to bring the suit.

8 We're talking about this small category of
9 cases, but I think from what I've just read, that you
10 envision a doctor who says, sooner or later, I'm
11 going to have such a case. Right now, I don't know
12 and I can't know until it's too late to come to any
13 -- so I'm going to bring in preenforcement which you
14 characterized as-applied. But I don't see how its
15 as-applied, if as Justice Stevens says, I don't have
16 to wait until faced with an actual medical emergency
17 to bring this suit. So what is the relief, what is
18 the lawsuit that you are thinking would be proper?

19 MS. AYOTTE: Justice Ginsburg, the
20 lawsuit would be a preenforcement as-applied
21 challenge and the physician would bring the claim and
22 would say, as applied to me, I perform abortions, I
23 also perform abortions on minors. I need to perform
24 an abortion in these emergency settings. The court
25 can issue an order, presuming it's not satisfied with

1 the protections that are set forth in New Hampshire
2 law --

3 JUSTICE GINSBURG: Could you do that as a
4 class action?

5 MS. AYOTTE: Depending on the
6 circumstance, he may be able to.

7 JUSTICE GINSBURG: What is the
8 circumstance? All you said here is preenforcement
9 challenge by doctors would not have to wait until
10 faced with an actual medical emergency.

11 JUSTICE STEVENS: Why isn't that this
12 case? I don't understand.

13 JUSTICE GINSBURG: That's it.

14 MS. AYOTTE: Justice Stevens, this is
15 not this case because this case is brought as a
16 facial challenge. Our entire act was struck down
17 based upon that one --

18 JUSTICE STEVENS: You think he had to do
19 an as-applied challenge when he has the patient in
20 his office? He has to wait until he has the patient
21 in the office, is that what you mean?

22 MS. AYOTTE: No, he doesn't. He can
23 bring it before the patient is in his office and then
24 the court can issue relief which would be much more
25 consistent with the -- certainly separation of powers

1 and allowing the overwhelming number of our
2 applications of our statutes that are valid to go
3 forward.

4 JUSTICE SCALIA: We're talking about a
5 lawsuit which asks for declaration, not that the
6 entire statute is invalid. But that, when faced with
7 an emergency of the sort that this discussion has
8 addressed, the physician can go ahead and perform the
9 abortion?

10 MS. AYOTTE: That's correct, Justice
11 Scalia.

12 JUSTICE SCALIA: Quite a different lawsuit
13 from this one.

14 MS. AYOTTE: That's quite a different
15 lawsuit and a lawsuit that would be certainly, from
16 the state's perspective, would allow the overwhelming
17 number of applications of this statute where there is
18 no dispute that it works well, to go forward.

19 JUSTICE STEVENS: But in Justice Scalia's
20 case, would not the reason for that relief have to be
21 a finding that the statute is unconstitutional? You
22 can't just grant the relief because you heard it's a
23 good idea.

24 MS. AYOTTE: Justice Stevens, it would
25 be only in the context of that one particular

1 application as applied to that physician, which would
2 have --

3 CHIEF JUSTICE ROBERTS: It would be a
4 finding that the bypass procedure is inaccurate which
5 doesn't necessarily implicate the general
6 notification provisions.

7 MS. AYOTTE: Mr. Chief Justice, that
8 would be the case. And certainly if that one
9 application, in that one potential rare case was
10 found not to be valid, then the remainder of the
11 application can go forward. And that is how most
12 cases work with respect to as-applied relief.

13 JUSTICE GINSBURG: What you're saying
14 essentially is that the First Circuit was concerned
15 with this category, not to give preenforcement relief
16 to the physician, so what they did was except. But
17 what they should have said is this statute is not
18 enforceable and it cannot be applied in any such
19 cases. If it's not a risk to their health, then the
20 statute is okay.

21 MS. AYOTTE: Justice Ginsburg, the
22 First Circuit went well beyond because it focused on
23 a general health exception, not focusing on an
24 emergency exception. But certainly the relief should
25 have been as-applied. If I may preserve the rest of

1 my time for rebuttal.

2 JUSTICE O'CONNOR: Did you ask that the
3 relief order below be more restrictive? Was that
4 challenged after the judgment was entered?

5 MS. AYOTTE: Justice Ginsburg --

6 JUSTICE O'CONNOR: Did the Court below
7 have a chance to consider carrying it more narrowly,
8 as you suggest today?

9 MS. AYOTTE: Justice O'Connor, we did
10 raise the application of the severance clause below,
11 although the court at the district court level and at
12 the First Circuit appeared to look at the -- the lack
13 of a general health exception as a per se
14 constitutional problem that rendered the statute as a
15 whole invalid.

16 JUSTICE O'CONNOR: I just am not clear to
17 what extent you really raised the possibility with
18 the court below of carrying its judgment more
19 narrowly as you're suggesting today should be done.

20 MS. AYOTTE: Your Honor, we certainly
21 raised the severance issue in the district court.

22 JUSTICE GINSBURG: You've used this word
23 severance now twice. Severance is I excised a part
24 of the statute, but you're not asking for that. Not
25 severance. There is no provision to be severed here.

1 It's caret law and adding something to it. Not
2 taking out a provision, but putting in an additional
3 provision.

4 MS. AYOTTE: Your Honor, you're
5 correct. What our position is is that they did not
6 meet the standard that they should have been able to
7 meet for a facial challenge, which would grant
8 as-applied relief which would only be invalid in that
9 one potential application. If I may reserve the rest
10 of my time, with all due respect.

11 JUSTICE ROBERTS: Thank you, General.
12 General Clement, we'll hear now from you.

13 ORAL ARGUMENT OF PAUL D. CLEMENT

14 AS AMICUS CURIAE, SUPPORTING PETITIONER

15 GENERAL CLEMENT: Mr. Chief Justice and
16 may it please the Court:

17 Respondents elected to bring a facial
18 challenge to New Hampshire's statute and succeeded in
19 their goal in enjoining the statute in all its
20 applications. Despite the facial nature of their
21 challenge, however, they do not contend that the
22 statute is invalid in all or even a large fraction of
23 its applications.

24 JUSTICE SOUTER: Well, that was true in
25 Casey.

1 GENERAL CLEMENT: Well, I don't think it
2 was, with respect, Justice Souter. This Court found
3 that with spousal notification critically, that there
4 was a large fraction of the application of the
5 statute --

6 JUSTICE SOUTER: Well, we may argue about
7 what the fraction may be and we may argue about what
8 substantiality means. But one thing I don't think we
9 can argue about is that Casey was applying the
10 Salerno standard.

11 GENERAL CLEMENT: Well, two things,
12 Justice Souter. I think, first of all, this case has
13 come up postured as being about a choice between
14 Salerno and the large fraction test. And I think in
15 some points, based on the way respondents approach
16 the case, that's become largely beside the point.

17 At footnote 13 of their brief, they could
18 not be more clear, that they are not here contending
19 that the statute is invalid in a large fraction of
20 their applications. They instead are embracing a per
21 se rule that if the statute does not have a health
22 exception or emergency exception clear on its face,
23 it is void in its entirety.

24 JUSTICE SOUTER: Once again, that may be,
25 but after Casey, I don't think one can plausibly

1 argue that the Salerno standard is the correct
2 standard. Whatever their position may be, whatever
3 fraction of substantiality may mean.

4 GENERAL CLEMENT: Well, I understand
5 that's your position, Justice Souter, given that you
6 joined Justice O'Connor in a separate writing in the
7 Fargo case. I think, however, that I read the
8 opinion in Casey and I see the large fraction
9 analysis only in the spousal notification context.

10 JUSTICE SOUTER: But why would we have a
11 separate rule on facial challenges merely for spousal
12 notification?

13 GENERAL CLEMENT: Well, I think that there
14 are two reasons, Justice Souter. First of all,
15 because this Court applied the no set of
16 circumstances test in Akron 2 to a parental
17 notification statute, this Court in Casey may not
18 have wanted to overrule Akron 2 to that extent.

19 Second of all, I think this Court in that
20 very passage about the large fraction test
21 specifically distinguished spousal notification
22 provisions from parental notification provisions.

23 JUSTICE SOUTER: What if I were to
24 conclude that under Casey, this fraction test applies
25 to this case. Suppose I were to say that Salerno

1 should not be applicable in this case. How should I
2 rule in this case?

3 GENERAL CLEMENT: You should clearly rule
4 in the state's favor. And the respondents have
5 really given you no choice because they aren't even
6 arguing that a large fraction of the applications of
7 the statute are invalid.

8 What you have before you is really a case
9 which literally a one in a thousand possibility if
10 there is going to be an emergency where the statute
11 will operate. And the real question for you is,
12 faced with that kind of case, do you invalidate 1,000
13 applications of the statute concluding that 999 of
14 them are constitutional?

15 JUSTICE SOUTER: Could the plaintiffs have
16 filed a narrower action attacking the adequacy of the
17 bypass procedure?

18 GENERAL CLEMENT: Absolutely. And they
19 also could have -- what I think that would envision
20 them following is an even narrower provision that
21 seeks a preenforcement declaration, kind of like
22 Steffel against Thompson would be the model, that
23 this statute can apply in an emergency situation.

24 JUSTICE BREYER: Now, that's exactly --
25 I'm leaving aside your fraction test, your 100

1 percent test, because I don't think they capture all
2 the considerations that are relevant. Focus on what
3 you just said. What you've done is you've tried to
4 create an injunction that will separate out the sheep
5 from the goats, all right? The goats are only
6 1 percent and the sheep --

7 GENERAL CLEMENT: But what does it say?

8 JUSTICE BREYER: I don't think you can say
9 enjoin the bypass procedure, because if you enjoin
10 the bypass procedure, there goes down the drain your
11 whole parental notification because you can't have
12 parental notification without a bypass procedure.

13 I don't think you can say enjoin
14 emergencies because to do that, you're going to have
15 to get into the greatest difficult issue there is in
16 this area, which is what does that health exception
17 mean. And we've said throughout that that health
18 exception has to be defined first by a legislature.

19 So if you tell me how to write that
20 injunction, then I'll be able to decide whether it's
21 possible for a court just to say, okay, we only
22 enjoin the goats as opposed to saying, legislature,
23 this is basically up to you, the whole area.

24 GENERAL CLEMENT: And Justice Breyer, I
25 would say the court has some discretion in how it

1 formulates that order. It would basically say that
2 this statute is not constitutional as applied to
3 those emergency situations.

4 And if I could just -- there's no
5 difference than Steffel against Thompson. There is a
6 case where there is a challenge against a broad
7 criminal trespass statute. The hearing in Steffel
8 was not that the whole criminal trespass statute was
9 unconstitutional. It was unconstitutional if you
10 apply it to leafletting. And Justice Brennan for a
11 unanimous Court said, yes, that's exactly the kind of
12 challenge you can bring. And you can get declaratory
13 judgment that says you can't do that, you can't apply
14 the statute as to leafletting. But you don't apply
15 it to criminal trespassing.

16 JUSTICE BREYER: The word leafletting is
17 not as fuzzy around the edges as health exception,
18 given the fact that lots of people think health
19 exception is the way of getting abortion on demand.

20 JUSTICE SCALIA: Do you agree with Justice
21 Breyer that the legislature can draw this with more
22 precision than a court could?

23 GENERAL CLEMENT: No, I don't.

24 JUSTICE SCALIA: I mean, that seems to be
25 a solution, that the legislature can make it precise,

1 although a court could not.

2 GENERAL CLEMENT: I think the court could
3 issue any order a legislature could issue. And I
4 think the fact that this court would have some
5 discretion is an answer to the argument that, oh,
6 well, if you leave this to the courts, you're cutting
7 the legislature out of this.

8 JUSTICE SOUTER: Why wouldn't it be an
9 abuse of discretion in this case? Because there
10 seems to be an ample record here that the
11 legislature, or a majority of the legislature made a
12 conscious choice that they would rather have no
13 statute than a statute with a health exception in it.
14 They deliberately said the only statute we want is
15 one without a health exception.

16 Therefore, even if you touch all the bases
17 that Justice Breyer has laid out, don't you end up
18 with a position that if we were to craft such a
19 limitation, we would be flying quite precisely in the
20 face of the expressed legislative intent.

21 GENERAL CLEMENT: I don't think that's
22 right, Justice Souter and I think it's because you
23 have to be careful. I think it's easy to use loose
24 language about a health exception. And I think if
25 you looked at the First Circuit opinion, they seem to

1 suggest there needs to be a health exception. And I
2 think in the context of a parental notification
3 statute, a health exception as opposed to a narrow --

4 JUSTICE SOUTER: Whatever you call it,
5 call it a health exception, call it an XYZ exception.
6 They knew what they were getting at, they knew what
7 they were worried about and they said, we will have a
8 statute without it or we will have no statute.

9 JUSTICE SCALIA: What about a suitability
10 provision. Didn't it have a suitability provision?

11 GENERAL CLEMENT: It did.

12 JUSTICE SCALIA: And it suggests the
13 opposite. It suggests the opposite, that if the
14 health exception is no good, the rest of the statute
15 would survive. Isn't that basically --

16 GENERAL CLEMENT: I think that's right --

17 JUSTICE SOUTER: I don't know how you
18 would sever a health exception that is not there.
19 They're saying if something is in here, you can sever
20 it and we'll be satisfied with what's left. In
21 effect, if we were to enjoin certain applications, we
22 would be injecting an exception that they've
23 rejected. And whatever that may be, it does not seem
24 to be severance.

25 GENERAL CLEMENT: Two answers, Justice

1 Souter. First of all, I think if you look at what
2 the New Hampshire legislature was concerned about,
3 they were concerned about a broad health exception
4 that undermined the statute, not an emergency
5 exception.

6 As to the severability point, I think in
7 several respects, severability is the wrong way of
8 looking at it. In the context of as-applied
9 challenges, this Court has not rigorously said that
10 you look at the applications and see whether they're
11 severable. The idea is that a statute is not
12 constitutional in certain applications.

13 But the New Hampshire legislature I think
14 has the belt and suspenders to worry about that if
15 you had a different view of that, it's the view that
16 actually Justice Thomas embraced in his Brooker
17 opinion, that actually you do look severance when you
18 do applications. The New Hampshire legislature
19 couldn't have been clearer, because they said not
20 only do you sever the provisions, but sever the
21 applications. We want to save as much of this action
22 as we can.

23 JUSTICE GINSBURG: The end of the passage
24 doesn't say that. The end of that provision says
25 sever a provision.

1 GENERAL CLEMENT: You're right, Justice
2 Ginsburg, but I don't think you look only at the end
3 of the statute. It clearly says, if any provision of
4 this subdivision or the application thereof to any
5 person or circumstance is held invalid, such
6 invalidity shall not affect the provision or
7 applications of this subdivision which can be given
8 effect without invalidating provisions or
9 applications.

10 It seems like they had this case in mind,
11 that there were circumstances in which perhaps some
12 court would say it was unconstitutional to apply it
13 and that's not a basis to strike down the whole
14 standard.

15 JUSTICE GINSBURG: There is usually great
16 question on the part of the court from tampering with
17 the statute. So proscission is one thing. You just
18 drop a provision. That's not possible here. Because
19 of the caret marks, which is what -- there is no
20 problem with what the legislature did. It's that
21 they didn't do enough. So the court would have to
22 add a provision. Not subtract. There is nothing to
23 subtract. It would be in addition and courts have
24 been reluctant to do that. They feel much more
25 comfortable cutting something out than putting

1 something in.

2 GENERAL CLEMENT: With respect, Justice
3 Ginsburg, I don't think that accurately describes the
4 way the courts have approached as-applied cases.
5 They often hold statutes unconstitutional as applied.
6 Think of Wisconsin against Yoder. This Court said
7 that a general compulsory education statute didn't
8 apply to the amish. It's just unconstitutional as
9 applied. They didn't think, boy, you know, the
10 Wisconsin legislature --

11 JUSTICE GINSBURG: Nobody asked them to do
12 anything other than that.

13 GENERAL CLEMENT: Well, I think that's
14 true, Justice Ginsburg, but it just shows that that's
15 the way that this Court approaches as-applied cases.
16 It's not a matter of reading something and saying the
17 statute doesn't apply.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 General. Ms. Dalven, we'll hear now from you.

20 ORAL ARGUMENT OF JENNIFER DALVEN

21 ON BEHALF OF RESPONDENTS

22 MS. DALVEN: Mr. Chief Justice and may it
23 please the Court:

24 The unfortunate reality is that some
25 pregnant teens experience medical emergencies for

1 which the appropriate care is an immediate abortion.
2 As the nation's leading medical authorities have
3 explained, delaying appropriate care for even a very
4 short period can be catastrophic and could result in
5 liver damage, kidney damage, stroke and infertility.

6 JUSTICE KENNEDY: Suppose I am concerned
7 that the record doesn't explain to me one way or the
8 other whether or not your and the medical
9 profession's definition of immediate allows time to
10 make one telephone call to a judge.

11 MS. DALVEN: Your Honor, several
12 responses. First, the undisputed evidence here is
13 that women in some emergencies, every minute is
14 critical. Every minute puts them at risk of losing
15 their future fertility and of major organ damage.
16 That is confirmed by the nation's leading medical
17 authorities which say that even very short --

18 JUSTICE KENNEDY: Well, there can be
19 nurses or attendants that can get the judge on the
20 line.

21 MS. DALVEN: Yes, Your Honor. Two
22 responses. First, the procedures that we submitted
23 in our supplemental brief that were approved by the
24 New Hampshire Supreme Court made quite clear that
25 there is no procedure for getting the judge on the

1 phone. And in addition, any delay --

2 JUSTICE KENNEDY: Well, I've looked at
3 those procedures and it seems to me that those are
4 interpreted as what should happen in the ordinary
5 case. They certainly don't preclude making a phone
6 call and there can be phone calls for warrants in
7 criminal cases in New Hampshire. That's specifically
8 provided.

9 MS. DALVEN: Yes, Your Honor, but I
10 believe that as Justice Breyer pointed out, if this
11 emergency happens on a Saturday, there is no
12 provision whatsoever for the minor. In addition --

13 JUSTICE KENNEDY: The problem was, it
14 seems to me, that the bypass procedure can go a long
15 way toward saving this statute, but this was not
16 litigated in the trial courts. We don't know what
17 New Hampshire's position is going to be. We don't
18 know what the facts are.

19 MS. DALVEN: Your Honor, I think what is
20 quite clear from all the briefs is that once a minor
21 arrives in the emergency room, it is too late for her
22 to go to court. There is, as we said, every minute
23 is critical and any delay from the time that the
24 doctor faces a pregnant teen, determines that she
25 must have an immediate abortion, any delay from that

1 point forward puts the minor's health at risk.

2 JUSTICE SCALIA: Surely not the delay for
3 a quick phone call. Let's assume New Hampshire sets
4 up a special office open 24 hours a day and this is
5 the abortion judge, and he can be reached any time
6 anywhere. It takes 30 seconds to place a phone call.
7 This is really an emergency situation? I guess if
8 that's the case, the doctor better not put on his
9 gloves.

10 MS. DALVEN: No, Your Honor, I think that
11 my question would be what would be the purpose in
12 such a statute if all you had to do was literally
13 call a number and the judge would say, okay. If the
14 judge had no time -- but the nurse had no time to
15 relay the facts, the judge had no time to ask any
16 questions, the judge has no time to consider the
17 evidence or look at the law, there is a real question
18 about what potential purpose there could be of
19 requiring even that small delay before a minor gets
20 the immediate treatment she needs.

21 JUSTICE KENNEDY: The purpose is to save
22 the statute which has thousands of applications that
23 are valid.

24 MS. DALVEN: But Your Honor, I don't think
25 that putting a teen's health at risk, respectfully,

1 is -- I don't think saving a statute is worth putting
2 a teen's health at risk.

3 CHIEF JUSTICE ROBERTS: Counsel, if your
4 objection goes to the adequacy of the bypass
5 procedure, what is wrong with a preenforcement
6 challenge by physicians, presumably with standing,
7 challenging the bypass procedure? Why should you be
8 able to challenge the act as a whole if your
9 objection is so narrowly focused?

10 MS. DALVEN: Two points, Chief Justice
11 Roberts. First is that our objection isn't to the
12 bypass process. We believe that there would be --
13 regardless of how good the procedures the New
14 Hampshire Supreme Court set up, there would still be
15 inherent delay between the time the doctor diagnoses
16 the patient and the time they get to court and get
17 the order. So it's not a problem with the judicial
18 bypass.

19 The second question --

20 CHIEF JUSTICE ROBERTS: But it's a problem
21 that arises only in the emergency situations.

22 MS. DALVEN: That's correct.

23 CHIEF JUSTICE ROBERTS: So bring in a
24 preenforcement challenge concerning compliance with
25 the act in emergency situations. Why does that even

1 implicate the vast majority of the cases that don't
2 create emergency situations?

3 MS. DALVEN: As Justice Ginsburg pointed
4 out, we believe that is this case. There is nothing
5 between this case -- the difference between this
6 case --

7 CHIEF JUSTICE ROBERTS: This case doesn't
8 involve an emergency situation. This is a facial
9 challenge. There is no case at issue at all.

10 MS. DALVEN: Your Honor, the state
11 conceded a preenforcement challenge brought by a
12 doctor before any particular patient was at risk
13 would be proper.

14 JUSTICE O'CONNOR: And what resulted here,
15 it would be invalidation of the entire statute and
16 all of its applications? Is that how it now stands?

17 MS. DALVEN: I believe that's how --

18 JUSTICE O'CONNOR: So the question you're
19 being asked is, how can that be narrowed in some
20 fashion to focus on the problems? The statute may
21 well have a majority of valid applications. So how
22 can we narrow the application? And what of our
23 doctrine allows a narrower application? So you need
24 to focus on that. Obviously, it's a matter of
25 concern.

1 MS. DALVEN: Sure. I think that this
2 Court in Casey addressed that consideration. And
3 Casey was essentially this case, a preenforcement
4 challenge brought to the adequacy of the medical
5 emergency exception. And this Court held that if the
6 law prohibited an immediate abortion for some of the
7 very same conditions we outline here, it would have
8 been unconstitutional.

9 CHIEF JUSTICE ROBERTS: Because the court
10 explained the inadequacies it identified were present
11 in the large fraction of cases. We don't know if
12 that's true here.

13 MS. DALVEN: Respectfully, Your Honor, not
14 with respect to the medical emergency exception. I
15 think that was true with respect to the spousal
16 notice provision, but not at all with respect to the
17 medical emergency exception.

18 This case, if we're talking about the same
19 conditions that were in Casey and here, actually here
20 there were additional considerations because in
21 Casey, there was a medical emergency definition that
22 extended to some health threatening circumstances and
23 here there was none.

24 JUSTICE GINSBURG: But why wouldn't it be
25 entirely adequate to protect what you're concerned

1 about today, since you have the statute is
2 unconstitutional to the extent that it fails to
3 provide an exception for situations where there is an
4 immediate danger to health, and then all those
5 immediate dangers to health situations would be left
6 unregulated. The statute doesn't reach them.

7 But nonemergency cases would continue to
8 be governed by the statute. Why couldn't -- in other
9 words, why wasn't that the appropriate judgment for
10 the First Circuit to have entered in this case, to
11 say it just applies in nonemergency cases. But for
12 emergency cases, there is effectively no law?

13 MS. DALVEN: Your Honor, that would solve
14 the constitutional problem in this case, but I
15 believe it's not the best course. First, as this
16 Court has already discussed, the states around the
17 country have adopted at least 10 different medical
18 emergency definitions. And this Court has no way to
19 know which if any of those formulations --

20 JUSTICE GINSBURG: But you wouldn't
21 have -- it would be that the emergency is not
22 regulated. Private doctors can act in the medical
23 emergency. They are not controlled by any
24 legislation.

25 MS. DALVEN: Yes, Your Honor. But many of

1 the states -- a few states have chosen to have a
2 special exception in cases of medical emergency.
3 Most of them --

4 JUSTICE O'CONNOR: But we're dealing with
5 New Hampshire. We have a specific case that
6 challenged New Hampshire law. So can we focus on
7 this one?

8 MS. DALVEN: Yes, Your Honor. I think we
9 still don't know which definition New Hampshire
10 would --

11 JUSTICE BREYER: From your point of view.
12 I don't know from the other side's point of view, I
13 guess it would satisfy you to say this statute can
14 not be enforced in any circumstance in which a
15 physician certifies in good faith that he believes an
16 immediate abortion is necessary for the health of the
17 mother. All you're looking to is the state of mind
18 of the physician.

19 Now, the problem that I think we would see
20 with that is you would then be writing into the law
21 the broadest possible definition of what that health
22 exception means. So I'm not sure if the New
23 Hampshire legislator would have wanted to do it and
24 I'm not sure the other side would like to do it. But
25 looking at it from your point of view, do you have

1 any objection to it?

2 MS. DALVEN: That's correct, Your Honor.
3 That would solve the constitutional problem here, but
4 Your Honor is right, I think there is a significant
5 concern about whether that's what New Hampshire --

6 CHIEF JUSTICE ROBERTS: Well, but that
7 would be litigated in a preenforcement, as-applied
8 challenge. I mean, you don't assume -- the fact that
9 this narrower focused proceeding is going to be --
10 could be brought doesn't mean -- doesn't answer the
11 question of how it's going to come out.

12 But presumably the litigation would be
13 very similar to what we've seen in this case, in
14 which a doctor is saying, well, you do need an
15 immediate medical exception. Others are saying the
16 judicial bypass adequately addresses the concerns.
17 But it would be focused on the provision that is
18 causing you concern rather than the statute as a
19 whole.

20 MS. DALVEN: Your Honor, I believe that
21 that really is this case. There is nothing in the
22 complaint that says this is a facial challenge, and
23 we only want a declaration that the statute is
24 unconstitutional and enjoin it in its entirety, and
25 if we can't have that, we want nothing else.

1 JUSTICE KENNEDY: But that's what happened
2 and you're here defending that judgment.

3 MS. DALVEN: Yes, Your Honor, we believe
4 it was the proper course, but there is nothing in the
5 complaint that says that we only want a total
6 invalidation.

7 JUSTICE O'CONNOR: Then is there any
8 objection by you to remanding this thing to let it be
9 more narrowly focused?

10 MS. DALVEN: I believe it is not the
11 better course for three reasons. One is we can't
12 tell what exception the New Hampshire legislature
13 would have chosen. In addition, I think there is
14 real cause for concern about rewriting this law for
15 New Hampshire. If this Court says that that's the
16 proper course, I believe that the federal judiciary
17 would be safe with rewriting abortion law after
18 abortion law after abortion law.

19 CHIEF JUSTICE ROBERTS: This complaint
20 asks for a preliminary and permanent injunction
21 against the act.

22 MS. DALVEN: Yes, that's right, Your
23 Honor. Also two points, though. We asked for any
24 other relief that is just and proper and we had other
25 claims that could not be solved by a more narrow --

1 by more narrow relief, we claimed that the act's
2 judicial bypass doesn't -- isn't sufficient under
3 this Court's case -- this Court's decision in Bellotti
4 II, it doesn't provide for confidentiality and there
5 is no way to remedy that without facial invalidation.

6 JUSTICE BREYER: I don't want you to agree
7 to this unless you've focused on this and agree this
8 is really your position. I take it, as I'm
9 listening, that you would not object to an injunction
10 that says that this statute cannot be applied in any
11 circumstance where a doctor, in good faith, himself
12 or herself, believes that there is a health
13 emergency, period.

14 Now, I take it as soon as we get more
15 narrow than that, you might object on the grounds
16 that that will leave ambiguous cases where there
17 really is a health emergency, but the doctor doesn't
18 know what to do and would have to go to court, by
19 which time it would be too late.

20 MS. DALVEN: That's right.

21 JUSTICE SOUTER: Have I stated it
22 correctly and focused on it, thought about it, stated
23 it?

24 MS. DALVEN: I appreciate that and yes,
25 Your Honor, I have.

1 JUSTICE SCALIA: In good faith and with
2 substantial support in sound medicine.

3 MS. DALVEN: Your Honor --

4 JUSTICE SCALIA: I mean, why should the
5 doctor who is very negligent and doesn't know what
6 he's doing, why should he be protected?

7 MS. DALVEN: Your Honor, I believe this
8 question focuses on exactly why this Court should
9 facially invalidate. It requires this Court to
10 decide official constitutional --

11 JUSTICE SCALIA: In your condition, good
12 faith is not enough. You can have a good faith
13 quack.

14 MS. DALVEN: Your Honor, we believe that
15 would be unconstitutional, and because it would
16 subject a doctor to going to jail for providing care
17 that he honestly believed was necessary to save a
18 patient's organs, to save a patient's future
19 fertility, to save a patient's vision. We believe
20 particularly in an area as controversial as abortion,
21 that that is inappropriate.

22 JUSTICE SCALIA: I'm sure that's the case
23 with regard to other medical procedures, if you're
24 grossly negligent, it's a criminal offense, I'm sure,
25 in most states.

1 MS. DALVEN: I believe it's generally a
2 medical malpractice and not a liability. But in any
3 event, this is a question for the Court. And in
4 National Treasury Employees Union, this Court said
5 that we're writing more narrow relief requires the
6 Court to answer additional constitutional questions
7 not directly presented by the case, the appropriate
8 court is to facially invalidate and let the
9 legislature decide how to write the exceptions. We
10 believe that's the appropriate course here as well.

11 In addition, going back to the legislative
12 abdication point, we believe that facially
13 invalidating -- rewriting the law here would
14 eliminate any incentive for legislatures to pass
15 unconstitutional laws in the first instance.

16 This was a clear requirement. This Court
17 has said for 30 years it cannot engage a woman's
18 health, you must have an exception for health
19 threatening emergencies. New Hampshire did not
20 include such an exception. And if this Court
21 rewrites that -- it was in essence putting a green
22 light to legislatures around the country to pass
23 broad restrictions and leave it to the doctors to go
24 to the courts and be the full defenders of the
25 right --

1 JUSTICE GINSBURG: The marvel of this
2 case, if doctors come to court, doesn't have to have
3 an actual patient class action and the court says the
4 statute cannot be applied to a medical necessity,
5 period. No fancy adding another provision which
6 courts generally don't do. There is no regulation of
7 medical emergencies. Why isn't that what -- doesn't
8 that fit the pattern of the case you've brought and
9 couldn't the First Circuit have done that and then
10 you would have no complaint?

11 MS. DALVEN: The First Circuit could have
12 done that. We did have additional claims --

13 JUSTICE GINSBURG: Yes, I know that.

14 MS. DALVEN: But the First Circuit could
15 have done it. We believe the First Circuit was
16 correct in not doing that for the two reasons I
17 discussed and an additional reason as well.

18 As Justice Souter pointed out, we don't
19 know at all that the legislature would have passed
20 this law with a broader exception. Indeed, 153 New
21 Hampshire legislators have told this Court that there
22 is significant doubt about whether they would. And I
23 know that might be surprising to some people, but I
24 would like to explain why, in the world of abortion
25 politics, it's not at all surprising.

1 Some folks in good faith believe that any
2 exception beyond one for a life-saving emergency
3 renders a ban -- a abortion restriction meaningless.
4 And they refuse on principle to vote for any broader
5 exception, any ban, any restriction that has a
6 broader exception.

7 JUSTICE SCALIA: Then you shouldn't have
8 voted for the severability provision which clearly
9 says if, in one of its applications, it's invalid,
10 the rest can be given effect without the invalid
11 provisions. I mean, the severability provision
12 really just, I think, contradicts your assertion that
13 the New Hampshire legislature wouldn't want this to
14 happen.

15 MS. DALVEN: Your Honor, a few things.
16 First, we don't believe that the severability clause
17 directs the court to sever applications. Second,
18 neither this Court nor a New Hampshire court treats
19 severability clauses as mandates. This question is
20 still whether, if there is significant doubt about
21 whether the legislature would have wanted it, they do
22 not sever, particularly whereas here, this Court
23 would have to make decisions for the legislature
24 about what that exception should look like.

25 JUSTICE STEVENS: May I ask this

1 historical information? Since the decision of the
2 district court and the decision of the court of
3 appeals, has the legislature considered enacting a
4 different statute that would solve the problems?

5 MS. DALVEN: They have not, Your Honor.
6 There has been no bill put forward, to my knowledge.

7 JUSTICE STEVENS: It wouldn't have been
8 all that hard to do. I don't know.

9 MS. DALVEN: That's right, Your Honor.
10 They could have enacted a law with a medical
11 emergency exception and we could have all gone home.

12 CHIEF JUSTICE ROBERTS: Well, maybe they
13 assumed that the medical health exception of the sort
14 you're arguing for is not constitutionally required
15 and that's what would be litigated in a narrow
16 focused challenge on the adequacy or inadequacy of a
17 bypass procedure. Maybe they assumed it would follow
18 the Salerno precedent, and they didn't have to worry
19 about severing in light of particular
20 unconstitutional applications.

21 MS. DALVEN: Perhaps that is true, Your
22 Honor, but I still believe that this is this case,
23 that there really is no different -- I mean, in
24 Casey, the plaintiffs brought a facial challenge
25 before the law took effect to the adequate --

1 challenging the adequacy of a medical emergency
2 exception.

3 And this Court indicated that if the law
4 prohibited an immediate abortion for women with the
5 conditions Dr. Goldner described in his declaration
6 here, it would have been unconstitutional and some
7 relief would have been appropriate, even though that
8 was a facial challenge and even though the alleged
9 inadequacies of the medical emergency would harm
10 relatively few women. So I don't think that there is
11 any bar to this Court --

12 CHIEF JUSTICE ROBERTS: Do you think the
13 statute, putting aside the medical emergency issue
14 under our precedence, is the parental notification
15 aspect of the statute constitutional?

16 MS. DALVEN: No, Your Honor. We had
17 additional claims --

18 CHIEF JUSTICE ROBERTS: Other than the
19 confidentiality?

20 MS. DALVEN: We believe we had three
21 claims, the health exception, the medical emergency
22 exception for health. The death exception we believe
23 is also inadequate and the confidentiality. In
24 addition, the procedures that the court issued -- the
25 New Hampshire Supreme Court approved raise an

1 additional problem as well. So there are claims in
2 addition to the health threatening emergency.

3 If there are no further questions from the
4 Court --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Counsel. The case is submitted.

7 (Whereupon, at 11:53 a.m., the
8 above-entitled case was submitted.)

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